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IN THE

Supreme Court of the United States

No. 509

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant

v.

ALBERT BAREFIELD, Appellee

BRIEF OF APPELLANT, LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

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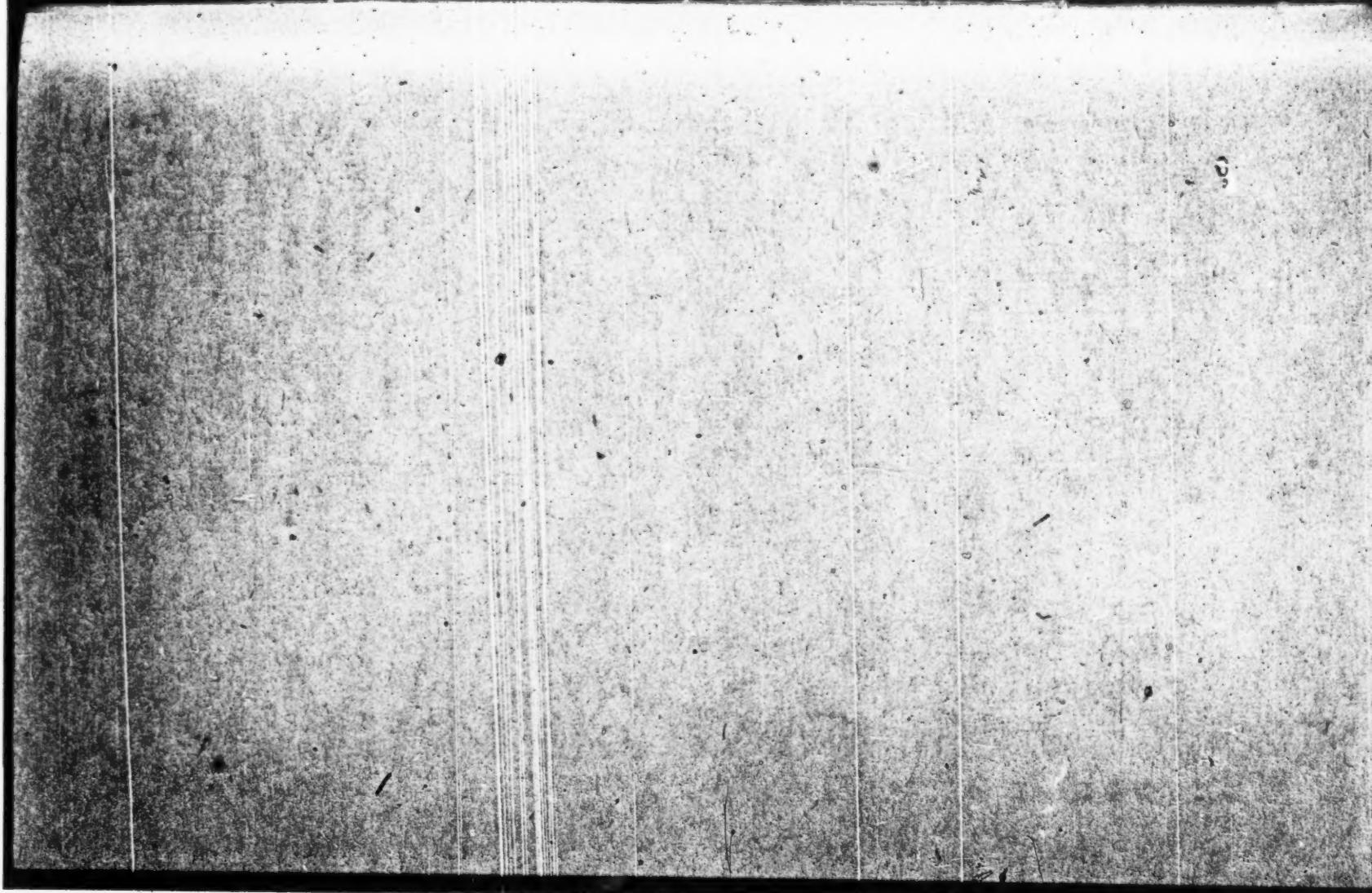

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I.

THE OPINION OF THE COURT BELOW

The opinion in the Arkansas Supreme Court has not been officially reported, but is copied in full in the record.

II.

JURISDICTION

The statement of jurisdiction as required by paragraph 1 of Rule 12 of the Supreme Court of the United States, has heretofore been filed and printed, and reference is here made to it as fully as if it were herein copied in full.

III.

STATEMENT OF CASE

The appellee, Albert Barefield, was accidentally injured on February 25, 1932, while riding in a private motor driven

automobile by being struck with a stick, which was "flipped" in the direction of the car in which the said Barefield was riding, striking the car at the front of the left hand door and then continuing striking the said Barefield in the right eye, causing a total and irrecoverable loss of the sight of said eye. There is no proof in the record of *any injury* to the automobile. At the time of this injury, he was insured under a Travel and Pedestrian Accident Policy issued by the appellant. The premium on this policy was Five ($5) Dollars and for the loss of one eye, the amount due if covered by the policy was the sum of $1,625.00. The premiums were paid on this policy at the time of the accident and there was liability under the policy provided the facts of the case made out an accident within the terms of the policy. The policy is copied into the record.

The appellee claims that the appellant is liable to him under the terms of the policy providing liability where he is injured "*by* the collision of or *by any accident* to any private horse-drawn vehicle or private motor driven car in which the insured is riding or driving." The case was heard upon stipulations which are set out in the Bill of Exceptions. The question, therefore, is whether the policy covers the loss of the eye to said Barefield where the facts are that a passing automobile "flipped" a stick which struck the automobile in which Barefield was riding and then continuing, striking the said Barefield in the eye, causing its loss, but not causing *any injury* to the automobile.

We particularly call the Court's attention to the fact that the complaint or declaration filed by the appellee does not allege that the stick in striking the automobile caused any "external or visible injury" on the automobile as provided by the terms of the policy. In other words, the policy requires three

things: (1) there must be an accident to the automobile; (2) this accident must cause the injury to the assured; and (3) the accident must leave on the automobile "some external or visible injury".

If any one of these elements is lacking, there can be no liability. The declaration or complaint in failing to allege that the accident left "some external or visible injury" on the automobile did not state a cause of action, and, accordingly, under well-known rules of law hereafter set out, any judgment rendered thereon would be absolutely void.

The Circuit Court held appellant liable, and this judgment was affirmed by the Arkansas Supreme Court. Appeal to this Court was prayed and was refused by the Arkansas Chief Justice, but was granted by Mr. Justice Butler of the Supreme Court of the United States.

IV.

SPECIFICATION OF ERRORS

1. There is no evidence in the record, the case being heard upon stipulation, to support the judgment of the Supreme Court of Arkansas.

2. The Supreme Court of the State of Arkansas erred in holding that the agreed state of facts, as a matter of law or fact imposed upon appellant any liability under the policy, and that Court erred in rendering any judgment against appellant.

3. The Supreme Court of the State of Arkansas erred in holding that the clause in the policy requiring external and visible evidence on the vehicle of the collision or accident, was an excepted clause; whereas ,in fact, it relates only to the de-

gree of evidence essential to liability under the policy, and without proof of which no recovery can be had; and further erred in holding that the Life & Casualty Insurance Company of Tennessee was liable under the policy without the facts appearing in the record showing visible signs of the accident. The case being heard upon stipulation, the question cannot arise as to whom the burden of proof is upon.

This holding of the Supreme Court of Arkansas violates appellant's rights under the due process clause of the Fourteenth Amendment of the Federal Constitution and its rights under Section 10 of Article 1 of the Federal Constitution prohibiting the impairing of the obligations of contract.

4. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety-Five (195) Dollars, and attorney's fees of One Hundred Sixty-Two and 50/100 (162.50) Dollars, or any amount for penalty and attorney's fees, under Section 6155 of Crawford & Moses' Digest of the Statutes or laws of the State of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, and Section 41 of Insurance Laws of Arkansas published 1930, which provides:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected."

This Statute is unconstitutional under the Fourteenth Amendment of the Federal Constitution of the United States inasmuch as it assesses this penalty and attorney's fees in all cases where an insurance company fails to pay a loss upon demand within the time specified by the policy and there is no provision in said Statute excepting those cases where the insurance company's failure to pay was in good faith and was based upon an honest belief that it had a good defense to the claim.

Appellant, as well as all other insurance companies, has the constitutional right under the Fourteenth Amendment to refuse to pay any claim so long as in doing so it does not act arbitrarily or unreasonably or for the purpose of vexation or delay and so long as its refusal to pay is not in bad faith, and the above act in denying them this right violates the said Fourteenth Amendment of the Constitution of the United States.

5. The Supreme Court of the State of Arkansas erred in including in the judgment in this case twelve (12%) per cent damages, that is, One Hundred Ninety-Five (195) Dollars, and attorney's fees for One Hundred Sixty-Two and 50/100 (162.50) Dollars, for the reason that there is no evidence whatever in the record that in refusing to pay said claim appellant acted either arbitrarily or unreasonably or for the purpose of vexation or delay or that its refusal to pay was in bad faith; and the inclusion of these items in said judgment under said Act renders the application of said Act unconstitutional under the Fourteenth Amendment.

6. There being no evidence in the record to support the judgment of the Arkansas Supreme Court either on the amount claimed under the policy or for the 12% damages and

the attorney's fees as above set out, the said judgment is void and unconstitutional under the case of *Woodson* v. *Railroad*, 134 U. S. 614, 33 L. Ed. 1032, and being void, Sections 4255-4259, 4270, 4287-4288 of Crawford & Moses' Digest of the Statutes of Arkansas, providing for the issuance of execution on said judgment to enforce its collection, declaring said judgment a lien upon the defendant's property, and generally providing for the enforcement of said void judgment, are in themselves, when given this application, void and unconstitutional under the due process clause of the Fourteenth Amendment.

Section 10, Subsection 1 of the Federal Constitution provides: "No State" shall make a law impairing the obligation of contracts and the Fourteenth Amendment expressly prohibits "any State" from taking property without due process of law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

7. Said Section 6155 of Crawford & Moses' Digest of Arkansas is also unconstitutional under Section 10 of Article 1 of the Federal Constitution in that it makes the appellant liable for the said 12% damages of $195 and said attorney's fees of $162.50, when there is no provision in the policy contract sued on providing for such payments or justifying the allowance of such amounts.

The above specification of errors are identical with the statement of the points upon which appellant gave notice that it intended to rely in this Court.

V.

ARGUMENT

SUMMARY OF ARGUMENT

Point A

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is unconstitutional in toto under the Due Process Clause of the Fourteenth Amendment and of Article 1 Section 10 of the Federal Constitution, forbidding the impairment of the obligations of contract by a State, or, if not in toto, then it is unconstitutional when applied to a case where there is no evidence of bad faith in refusing to pay the claim and resisting it in Court.

Point B

The policy expressly provides that in order for there to be liability there must be "some external or visible injury" on the automobile. The complaint or declaration does not allege nor is there any fact in the record showing any "external or visible injury" on the automobile. Accordingly, the judgment is void because based upon a declaration or complaint showing no cause of action and upon a record containing no evidence of liability.

Point C.

The Arkansas Supreme Court erroneously held that although there was no evidence in the record of any "external or visible injury" to the automobile, yet this was an excepted cause and the burden of proof to show such fact was upon appellant, and the record being silent upon the subject, the Court would infer the fact that there was some "external or

visible injury" to the automobile, caused by the alleged accident. This case was tried upon stipulated facts and the Arkansas Supreme Court was bound by such facts as stipulated by the parties, and the stipulation containing no fact of any "external or visible injury" to the automobile, the Arkansas Supreme Court was without constitutional power under the Fourteenth Amendment to add to the stipulation a fact without which under its own opinion and judgment, there could be no recovery.

Point A

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is unconstitutional in toto under the Due Process Clause of the Fourteenth Amendment and of Article 1, Section 10, of the Federal Constitution, forbidding the impairment of the obligations of contract by a State, or, if not in toto, then it is unconstitutional when applied to a case where there is no evidence of bad faith in refusing to pay the claim and resisting it in Court.

This Court had before it, in the case of *Supreme Ruling of the Mystic Circle* v. *Snyder*, 227 U. S., 500, 57 L. Ed., 614, the exact question presented in this case. The Tennessee statute provided a penalty against insurance companies where the failure to pay was in bad faith, and, notwithstanding this provision, it was contended that the effect of the Tennessee statute was to penalize insurance companies merely because a judgment might be rendered against them. To show that this Court understood the contention as we have thus stated it, we quote the following:

> "But we are asked to look behind the language of the statute and to assume that its effect is to impose the additional liability in the *absence of bad faith*. That is,

we are to take the statute as including what it expressly excludes—as allowing what it explicitly denies. The act does not make the *mere refusal to pay* sufficient evidence of bad faith, so as to justify the added recovery; it requires that the *bad faith be shown*, and that the *consequent additional loss be shown*. And the State Court so construed the statute in the application that was made of it in the present case."

In order to show that the Court in the above case considered the very point presented in this case, we quote the following:

"The statute is aimed, not at the rights secured by the contract, but at *dishonest methods* employed to defeat them. The additional liability is attached to *bad faith alone*. This is the necessary effect of the proviso. It is only when it is 'made to appear to the Court or jury trying the case that the refusal to pay said loss was *not in good faith*' that the added recovery may be had. It must also appear that such refusal *inflicted 'additional expense, loss, or injury'* upon the policyholder, and it is this *further expense, loss or injury* that *measures* the amount to be allowed, which is not to exceed 25 per cent of the liability on the policy.

"It cannot be said that this effort to give indemnity for the *injuries* which would be *sustained* through *perverse methods* and through an *abuse* of the *privileges accorded to honest litigants* imposed a burden upon the enforcement of the contract. Neither the contract nor the existing law which entered into it contemplated contests *promoted in bad faith*, or justified the *infliction of loss* by such means. The State was entitled at all times to take proper measures to prevent the *perversion* of its *legal machinery*, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be *availed of bona fide*."

This Court also had this question before it as applied to the right to resort to Federal Courts in the cases of *Terral* v. *Burke Construction Company*, 257 U. S. 529, 66 L. Ed. 352, and *Mortensen* v. *Security Insurance Company*, Adv. Sheets, Vol. 77, No. 11, 673.

In *Terral* v. *Burke Construction Company*, supra, this Court held that a legislative act denying to a foreign corporation, under the penalty of the cancellation of its license, the right to resort to a Federal Court or to remove a case to a Federal Court was unconstitutional.

In *Mortensen* v. *Security Insurance Company*, supra, this Court applied this same principle of law to a State anti-removal statute as applied to a foreign insurance company and held the statute unconstitutional.

These two last cases clearly hold that a State statute having for its object the denial of the right to a litigant to resort to a Federal Court is unconstitutional under the Fourteenth Amendment, and likewise for the same reasons, it is clear that the same rules of law would apply to the right of a citizen to apply to State Courts either in the assertion of or in the defense of any right which it, in good faith believes, constitutes a good cause of action or a good defense.

This is the view taken of this Arkansas penalty Statute by the United States Circuit Court of Appeals of the Eighth Circuit in the cases of *Standard Accident Insurance Company* v. *Rossi*, 35 F. (2) 667, and *Intersouthern Life Insurance Company* v. *McElroy*, 38 Fed. (2) 557, in which the Court expressed the opinion that this penalty statute was unconstitutional when applied to cases where the refusal to pay or the defense of the suit was not in bad faith. Showing that the

Arkansas Supreme Court recognized the law on this question as laid down by the United States Circuit Court of Appeals for the Eighth Circuit, the following is copied from its opinion in the present case, Record, page 19:

> " * * * assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. *Security Ins. Co.* v. *Smith*, 183 Ark. 254, 35 S. W. (2d) 581; *Mut. Life Ins. Co.* v. *Marsh*, 185 Ark. 332, 47 S. W. (2d) 585, *where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co.* v. *Rossi*, 35 Fed. (2d) 667, and *Intersouthern Life Ins. Co.* v. *McElroy*, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

We, therefore, submit that this penalty statute of Arkansas is unconstitutional in toto because it makes no provision for excepting those cases where the refusal to pay the claim or the defense of the suit was not in bad faith; if not in toto, then it is unconstitutional as applied to a case showing no evidence of bad faith in refusing to pay the claim or in resisting its payment in Court.

The appellee in its brief, submitted in support of its motion to dismiss this appeal, relied upon the cases of *Fidelity Mutual Life* v. *Mettler*, 185 U. S. 308, *Iowa Life* v. *Lewis*, 187 U. S. 335, *Home Life* v. *Fisher*, 188 U. S. 528, and *Farmers and Merchants Insurance Company* v. *Dobney*, 189 U. S. 301. None of these cases considered the questions here involved, but were decided upon two other questions:

1. That a State has the right to prescribe whatever conditions it may deem proper as a condition precedent to a corporation of another State entering the State to do business; and,

2. That the placing of a penalty upon insurance companies and no other class of corporations was a class distinction forbidden by the Federal Constitution.

In the case of *Security Mutual Life* v. *Pruitt*, 202 U. S. 264, 50 L. Ed., 1013, this Court held that a State had the right to prescribe as a condition precedent to its admission into the State that an insurance company would not remove a case from the State to the Federal Court, but in *Terral* v. *Burke Construction Company*, 257 U. S., 529, 66 L. Ed., 352, this Court reversed that ruling, and held that the right of corporations to resort to a Federal Court could not be abridged by a State statute on the ground that it was a condition precedent to admission to the State. In *Mortensen* v. *Security Insurance Company*, decided on March 27, 1933, Advance Sheets, Vol. 77, No. 11, page 673, this Court expressly held that a State could not prescribe as a condition precedent to admission to the State the condition that an insurance company should not remove a case from a State to a Federal Court.

We, therefore, submit that the above cases relied upon by appellee are no longer applicable so far as relates to the right of an insurance company to resort to any Court in order to defend a suit in good faith.

Likewise, the case of *Sioux County* v. *National Security Co.*, 276 U. S. 239, 72 L. Ed. 549, likewise relied upon by appellee, has no bearing upon the contention here made. That case related to the right of the attorneys for the county to have taxed as cost an attorneys' fee, as authorized by Section 6193 of the Nebr. Comp. Stat. The United States Circuit Court of Appeals for the Eighth Circuit held that, inasmuch as Rev. Stat., Sec. 823 and 824 provided *what costs* should be taxed against litigants in the Federal Court, a

State statute in reference to costs would have no application. This Court reversed the Court of Appeals on this point. However, the following shows that we have correctly stated the point upon which the Court decided the case:

> "In striking down so much of the judgment as allowed an attorney's fee the Court below was persuaded that Sec. 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the State Court. As costs in the Federal Courts are regulated exclusively by Rev. Stat., Sec. 823 and 824, the Court concluded that other costs authorized only by a State statute, could not be included in the judgment."

It will thus be seen that this Court in none of the cases mentioned above, relied upon by appellee, considered or decided the point that a State statute could not authorize the assessment of penalties or attorney's fees against an insurance company merely because a judgment might be rendered against it, and without reference to its bad faith in denying payment of the claim and resisting suit in Court.

When we considered that it is only by executions and other processes of Courts that property may be taken, it ought to be clear that the right to resort to Courts honestly and in good faith is the very essence of the Fourteenth Amendment. By a long line of judicial decisions, the maxim of law has been thoroughly established that the right to tax or the right to regulate is the right to destroy, and, accordingly, if a State Legislature may impose a penalty merely because a judgment is rendered against an insurance company, it could go further and deny such company the right to resort to Courts at all either in the assertion or defense of its rights. If this could be done, the Fourteenth Amendment would be a useless scrap of paper.

Point B

The policy expressly provides that in order for there to be liability there must be "some external or visible injury" on the automobile. The complaint or declaration does not allege nor is there any fact in the record showing any "external or visible injury" on the automobile. Accordingly, the judgment is void because based upon a declaration or complaint showing no cause of action and upon a record containing no evidence of liability.

The following cases hold that where a declaration or complaint sets out no cause of action, the Court cannot render a judgment thereon, and any judgment rendered on such a complaint or declaration is absolutely void, even though the case might have been solemnly tried in Court, and no appeal taken from the judgment.

> *U. S. v. Northern Pacific*, 177 U. S. 435, 44 L. Ed. 836.
> *Wills* v. *Claflin*, 92 U. S. 135, 23 L. Ed. 490.
> *Bank* v. *Smith*, 11 Wheat. 171, 6 L. Ed. 453.
> See 21, R. C. L., Section 148, page 603.

The judgment in this case is accordingly void and the enforcement of any void judgment constitutes a violation of the Due Process Clause of the Fourteenth Amendment.

There is absolutely no fact in the record showing that there was any "visible or external injury" to the car caused by the alleged accident, and accordingly, the judgment rendered in this case on a record showing no evidence of liability is void and unconstitutional under the Due Process Clause of the Fourteenth Amendment. This exact question was before this Court in the case of *Woodson* v. *Railroad*, 134 U. S. 614, 33 L. Ed., 1038, wherein this Court expressly held that a

judgment of the Tennessee Supreme Court supported by no evidence was void under the Fourteenth Amendment. The Court is also asked to read the case of *Mahoney* v. *Railroad*, 89 Tenn. 311, wherein the Tennessee Supreme Court reviewed the Woodson case and recognized that it laid down the rule that a judgment supported by no evidence was absolutely void and unconstitutional under the Fourteenth Amendment. The Woodson case originated in the Circuit Court of Haywood County, Tennessee, and was tried twice before a Court and jury and a judgment rendered for the plaintiff each time. It was tried a third time before a Court and jury and again a verdict was rendered for the plaintiff in which the Circuit Judge, although holding that there was no evidence to support the verdict, nevertheless held that he was bound to affirm it under the Tennessee statute forbidding the Court to set aside a third verdict on the facts. The case was appealed to the Tennessee Supreme Court and there affirmed, the Court holding that although there was no evidence to support the verdict it was required to affirm the verdict under the Tennessee statute forbidding the Court to set aside a third verdict on the facts.

The case was carried to the Supreme Court of the United States on a writ of error and this Court held that the statute was constitutional when applied to a judgment supported by some evidence, but that it was unconstitutional when applied to a judgment supported by no evidence and that a judgment supported by no evidence was void and unconstitutional under the Fourteenth Amendment. In this case, there being no evidence of any "visible or external injury" to the automobile, as required by the terms of the policy, the judgment rendered in this case is unconstitutional and void under the Due Process Clause of the Fourteenth Amendment.

This Court in the case of *Windsor* v. *McVeigh*, 93 U. S. 274, reached the same conclusion by a different line of argument, wherein it held that where a party was denied the right to introduce evidence, it was equivalent to the withdrawal of service of process and the judgment unconstitutional and void.

Point C

The Arkansas Supreme Court erroneously held that although there was no evidence in the record of any "external or visible injury" to the automobile, yet this was an excepted cause and the burden of proof to show such fact was upon appellant, and the record being silent upon the subject, the Court would infer the fact that there was some "external or visible injury" to the automobile, caused by the alleged accident. This case was tried upon stipulated facts and the Arkansas Supreme Court was bound by such facts as stipulated by the parties, and the stipuation containing no fact of any "external or visible injury" to the automobile, the Arkansas Supreme Court was without constitutional power under the Fourteenth Amendment to add to the stipulation a fact without which, under its own opinion and judgment, there could be no recovery.

The Arkansas Supreme Court held that there was no evidence in the record of any "external or visible injury" to the automobile, and, accordingly, under the record, judgment ought to have been rendered for the appellant, dismissing the suit, but it erroneously held that the provision requiring "external or visible injury" to the automobile was an excepted cause and there being no evidence in the record one way or the other on the subject, the Court would infer that in fact there was an "external or visible injury" to the car, as re-

quired by the policy, and on this ground alone affirmed the judgment of the Court.

This means that the judgment could not have been affirmed by the Arkansas Supreme Court unless it had added the essestial fact showing an "external or visible injury" to the car. Parties have the constitutional right to have their interest determined by the record in the case, and no Court may constitutionally under the Fourteenth Amendment add to the record a fact essential to a recovery. If that were true, records would be of no value. Hearing cases on stipulated facts is an established practice in all Courts and means that the parties agree that certain facts are true, and on these facts the judgment of the Court is asked. If a Court, in order to reach a different result, may add an essential fact to a stipulation, it destroys the legal effect of the stipulation entirely. It may be that such fact added by the Court is not true. The presumption is that the parties are represented by capable counsel and that each fact has been placed in the stipulation that was available and where a fact is left out there is a conclusive presumption that no such fact existed.

In *Birmingham Post Company* v. *Sturgeon*, (Ala.), (Supreme Court), 149 So. 74, No. 1, Advance Sheets, July 27, 1933, the Court held that where a pertinent fact is omitted from a stipulation it is presumed that no such fact existed. See also *Saltonstall* v. *Russell*, 152 U. S. 629; 36 Cyc. 1283; and 60 Corpus Juris, 69, Section 51.

Another proposition to which we wish to sharply call the attention of the Court is that there being no evidence of any "external or visible injury" to the automobile, the legal effect of the judgment of the Arkansas Supreme Court is to strike out the provision of the policy providing for such "external or

visible injury" to the automobile, as a condition precedent to liability.

Where parties have entered into a contract and the language used is *free from ambiguity*, no Court can constitutionally construe said contract so as to ignore the plain meaning of the provision, as placed in the contract by the parties.

Vol. 8, Cyc., page 933 (d):

"*Judicial Decisions.*—Where parties have entered into a contract valid at the time under the laws of the State it is not competent for the Courts of the State to impair the obligation of that contract," citing the following authorities:

Los Angeles v. *Los Angeles City Water Co.*, 177 U. S., 558; 20 S. Ct., 736, 44 L. Ed., 886.

Houston, etc., R. Co. v. *Texas*, 177 U. S., 66, 20 S. Ct., 545, 44 L. Ed., 672.

Louisiana v. *Pilsbury*, 105 U. S., 178, 26 L. Ed., 1090.

Chicago v. *Sheldon*, 9 Wall. (U. S.), 50; 19 L. Ed., 594.

Butz v. *Muscatine*, 8 Wall, (U. S.), 575, 19 L. Ed., 490.

Thompson v. *Lee County*, 3 Wall, (U. S.), 327, L. Ed., 177.

Union Bank v. *Geary*, 5 Pet. (U. S.), 99, 8 L. Ed., 60.

This rule was very clearly stated in the following words by the Supreme Court of Alabama, in *Life & Casualty Insurance Company of Tennessee* v. *Whitehurst*, not yet officially reported, decided March 30, 1933:

"It is true that insurance policies should be liberally construed to effect the intentions of the parties, and in cases of doubt a contract will be construed most strongly

against the party who framed it, yet the function of courts is to construe them, not to make them.

"In 14 R. C. L., pp. 928-929, the rule is stated, with citation of numerous authorities to support it, that: 'In the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability, and to impose whatever conditions they please upon their obligations not inconsistent with public policy; and the courts have no right to add anything to their contracts, or to take anything from them.'

"And our own Court, in the recent case of *Life and Casualty Ins. Co. of Tenn.* v. *Tollison*, 223 Ala., 78, 135 So., 805, gave its approval to the above stated language: 'We approve, as of course the rule that insurance contracts may be and often are made with very limited coverage, the small premium fixed on careful calculation of the hazard assumed; and they should be enforced, not a new or enlarged contract made for the parties.'"

The fact that the Arkansas Supreme Court bases its decision upon the ground that the provision requiring "external or visible injury" on the automobile was an excepted cause, is not material; for this is a matter of the use of words or construction which varies and changes the plain meaning of the contract. The provision requiring "external or visible injury" to the automobile is *not an accepted cause,* and relates to the *degree of evidence* required before liability can attach. Such an agreement is valid and violates no public policy. Accordingly, it cannot be read out of the policy under constitutional limitations merely by stating that it constituted an excepted cause. Whether or not it is an excepted cause is also not material, for the reason that the *facts are stipulated* and the stipulation contains *no statement* that there was "external or visible" injury on the car. Where facts are stipulated by the parties, the law in reference to burden of proof has no appli-

cation, it being presumed that the whole facts in issue between the parties are in the stipulation without reference to questions of burden of proof.

The evidence in the record shows that the injury to appellee's eye was caused by the stick striking it. The stick was put in motion by the passing car and not the car in which he was riding. Accordingly, the accident to the car in which he was riding did not cause the injury to the eye.

The case of *Life & Casualty Insurance Company of Tennessee* v. *Whitehurst*, decided by the Supreme Court of Alabama on March 30, 1933, was upon almost identical facts and the Court held that no liability could attach unless the injury was caused by the accident. The following is copied from the opinion:

> "The evidence upon which the case was submitted shows that the insured at the time of the fatal accident was riding in an automobile on a public highway, in Mobile County, and that she was shot by a deputy sheriff; that there was no intention on the part of the officer to shoot the insured; that the bullet which struck her was fired 'at, through and into said automobile for the purpose of disabling the automobile and causing it to stop.' A number of shots 'were fired at the rear tires and the gasoline tank.' And one of the bullets 'pierced the glass window forming a part of the back of the automobile and struck insured in the back of the head.' It was this bullet that caused her death. In piercing the rear of the automobile, the bullet which struck the insured 'caused and left external and visible evidence of the accident on the automobile.'
>
> "From the foregoing statement of the evidence only one logical conclusion can be reached, and that is that the

bullet was the sole proximate cause of the death of the insured, and *not the accident* to the automobile. It is perfectly apparent that the bullet fired from the pistol operated to produce the death of the insured without the intervention of any independent or unforeseen cause or event, without which the injury could not have occurred. This being true, the firing of the bullet, and the bullet were the proximate cause of the death of the insured."

Another fact which we wish to emphasize is that under this accident policy, there could be no accident to the car without an injury to the car. If there was no injury to the car, the accident would have been harmless, and could not have resulted in any injury to plaintiff's eye. Generally speaking, there is no such thing in law as an accident without an injury, but certainly under this policy it is clear that if no injury was inflicted upon the car, the injury to appellee's eye could not have been caused by the accident.

For these reasons, also, we state that the legal effect of the judgment of the Arkansas Supreme Court was to take out of the contract entirely the provision requiring "external or visible" injury to be on the car, which under the authorities above cited was beyond its constitutional power under the Fourteenth Amendment and under the Federal Constitution relating to the impairment of the obligation of contract.

The complaint or declaration stating no cause of action, and there being no evidence to support the judgment, it is, under the above authorities, absolutely void, and any execution issued therein, accordingly, would be absolutely void. 15 R. C. L., Section 193, page 739, and authorities cited.

Accordingly, Sections 4255-4259, 4270, 4287-4288 of Crowford & Moses' Digest of the Statutes of Arkansas, providing for the issuance of executions on judgments are unconstitutional under the Fourteenth Amendment when applied to the enforcement of a void judgment.

CONCLUSION

It is earnestly insisted by appellant, Life & Casualty Insurance Company of Tennessee, that the decree and judgment of the Supreme Court of Arkansas sustaining the validity of Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas, as applied to the facts of this case, is erroneous and that said Act and the judgment herein is repugnant to the respective clauses of the Federal Constitution as hereinbefore set out, and that the judgment herein rendered on the merits of the case also be reversed and dismissed.

We, therefore, respectfully ask that the judgment of the said Arkansas Supreme Court be reversed and judgment entered here for the appellant, Life & Casualty Insurance Company of Tennessee, so as to correct such errors.

This brief for appellant was prepared without the record being available. Upon November 6, 1933, a telegram was received from the Clerk of this Court notifying appellant that the case would be heard within a week, during which time the record must be printed and all briefs prepared. Many other authorities could have been cited, but the want of time limited appellant in the preparation of this brief. Accordingly, there are no references to the pages in the record.

All italics are ours.

Dated this 7th day of November, 1933.

Respectfully submitted,

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